IN THE PHONEPAYPLUS TRIBUNAL CASE REF: 11894

BETWEEN:

PHONEPAYPLUS LIMITED

Executive

-and-

PEEKABOO INVESTMENTS LIMITED

Respondent

ADJUDICATION BY CONSENT ("CONSENT ORDER")

Introduction

1. This consent order shall relate to the matter under PhonepayPlus case reference 11894, and the oral hearing listed for 19 and 20 November 2013, requested by the Respondent.

2. This consent order is made following admissions of liability by the Respondent for the breaches set out in the Executive's Statement of Case attached as a schedule to this Consent Order.

3. In respect of Service 2 as described in the Executive's Statement of Case, any admissions are made without prejudice to PIL's evidence in this case concerning the timing of any breaches and the transfer of that service to Mobjizz Limited.

4. This order further sets out the agreement of the parties in respect of the sanctions to be imposed on the Respondent and the administrative charges to be paid. The agreed sanctions and administrative charges have been approved by a legally qualified member of the Code Compliance Panel pursuant to paragraph 3.16(d) of Annex 2 to the PhonepayPlus Code of Practice (twelfth edition) ("the Code").

Agreed Sanctions

5. The sanctions hereby agreed by the parties are:

    a. a penalty of £150,000;

    b. a formal reprimand; and

c. a requirement that the Respondent refund any consumers affected by any of the admitted breaches and who claim a refund, for the full amount spent by them on any of the relevant services, within 28 days of their claim, save where there is good cause to believe that such claims are not valid, and provide evidence to PhonepayPlus that such refunds have been made.

Administrative Charges

6. The Respondent shall pay the legal and administrative charges incurred by PhonepayPlus in relation to this case up to the sum of £25,000.

Payment of fine and administrative charges

7. The fine and administrative charges are to be paid within 28 days of the date of this Order, subject to any alternative payment arrangements which may be agreed between the parties.

Oral Hearing date and liberty to apply

8. For a period of three months from the date of this Consent Order, the Executive shall be at liberty to present evidence to the Tribunal for it to determine whether it may wish to impose a sanction under paragraph 4.8.2(f) or (g) of the Code. The Respondents shall have the opportunity to make representations on whether the Tribunal should do so. This shall be without prejudice to the procedure set out in paragraph 4.8.6 of the Code.

9. The oral hearing dates of 19 and 20 November 2013 shall be vacated.

David Cockburn (Chair)
On behalf of the Oral Hearing Tribunal
20 December 2013

CASE REF: 11894

BETWEEN:

PHONEPAYPLUS LIMITED

Executive

- and -

PEEKABOO INVESTMENTS LTD

("PIL")

Respondent

EXECUTIVE'S STATEMENT OF CASE

Introduction

1. The case that the Executive raises against PIL is closely connected to a further case raised against another Level 2 provider, Mobjizz Ltd ("ML") and this Statement of Case should be read in conjunction with the Executive's Statement of Case in relation to ML, of even date (the "ESoC-ML").

2. Between 30 August 2012 and 12 March 2013, the Executive received 67 complaints about 3 services (together, the "Services") operating on 7 shortcodes.

3. The Services all provided access to pornographic videos and, in two services, the ability to "rate" women appearing in such videos. The videos were accessed from and on mobile phones with internet access. The ability to access the Services was charged and this charging was done by the sending of reverse billed text messages. A fuller description of the Services appears below.

4. 1 of the Services was provided by PIL ("Service 3") and 2 of the Services were provided, consecutively, by PIL and then ML ("Services 1 and 2"). Neither PIL nor ML have said that Services 1 and 2 changed following their 'transfer' from PIL to ML.

5. Also, it appears that PIL and ML have the same personnel and operate from the same building. In particular (or at least), they share Jack Cresswell and Christian Amicabile as directors and/or key personnel. It was Mr Cresswell who signed both contracts to run the Services with the 2 Level 1 Providers in this case: IMImobile Limited (in relation to 2 of the Services), and, OpenMarket (in relation to 1 of the Services) (**Annex 6**). The transfer of the 2 Services IMImobile hosted from PIL to ML happened by way of a novation agreement between PIL and ML, with IMImobile as a party, effective from 9 October 2012 (at **Annex 9**). Services 1 and 2 are further described as "PIL Services 1 and 2" in respect of the pre novation period, and, the "ML Services 1 and 2" for the post novation period.

The Services

6. As mentioned above, the Services comprised 3 services. They were: Service 1, a subscription service whereby videos were accessed by paying a weekly subscription of £4.50 (this service resulted in 22 complaints); Service 2, a pay per video service whereby videos were accessed by paying £4.50 for each video and women could be rated for £1.50 (this service resulted in 24 complaints); and, Service 3, a video on demand service whereby videos were accessed by an app by paying £4.50 for each video and women could be rated for £4.50 (this service resulted in 27 complaints).

7. Services 1 and 2 operated on shortcodes 69011, 69023, 69024, 69030, 89069 and 89269. Service 3 operated on shortcode 89080.

PIL Services 1 and 2

8. Despite receiving complaints about them, the Executive was only able to monitor the ML Services. It was able to monitor Service 3. However, it is the Executive's contention that the operation of the PIL Service 2 is unlikely, on a balance of probabilities, to have changed following novation. Similarly, whilst breaches of paragraph 2.2.5, 2.3.2 and 2.3.3 by Service 2 and of paragraph 2.3.3 by Service 1 below are based on the monitoring by the Executive of the ML Services, it is the Executive's contention that, on a balance of probabilities, a consumer's experience of both the PIL Services 1 and 2 and the ML Services 1 and 2 would have been identical.

9. This contention is corroborated by the similarity in the complaints received by the Executive for both the PIL Services 1 and 2 and the ML Services 1 and 2.

10. On that basis, it is the Executive's contention that the PIL Services 1 and 2 operated in the ways described at paragraphs 10 to 24 of the ESoC-ML.

11. The Appendix to the ESoC-ML sets out a summary of the Level 2 Providers, the services, the monitoring available for each service, and, the breaches the Executive raises.

12. Alternative to the Executive's contentions above in respect of PIL Services 1 and 2, the Executive alleges breaches of Rules 2.2.5, 2.3.2 and 2.3.3 in respect of Service 2 and rule 2.3.3 in respect of Service 1 on the basis of the evidence of complainants, at **Annex 1**.

Service 3

13. The Executive also alleges breaches of Rules 2.2.5, 2.3.2 and 2.3.3 in respect of Service 3, which was promoted in a similar manner to Services 1 and 2 (as described at paragraphs 10 and 11 of ESoC-ML. Monitoring for Service 3 was done by the Executive with the search term "big tits". Again, one of the first links that appeared was for the website "*www.pornhub.com*". Again, after entering the Pornhub website;

several buttons appeared at the top of the screen. However, there was no button entitled "*Premium HD*", there was one simply entitled "*PREMIUM*".

14. Where a consumer pressed on the Premium button, the same dialogue box described at paragraph 12 of the ESoC-ML appeared.

15. Where a consumer pressed the "*DOWNLOAD*" button, a screen that appeared to announce the downloading of the app appeared. The text towards the bottom of the screen stated

    "*Thank you for downloading our app. We're sure you'll love using it!*"

    Above this text were two buttons entitled "*Save*" and "*Cancel*".

16. Where a consumer pressed the Save button a further screen appeared which appeared to announce the completed downloading of the app. The same text as described in paragraph 25 of the ESoC-ML appeared as well as two buttons. However, these buttons were entitled "*Open*" and "*Dismiss*".

17. Where a consumer pressed the Open button, a standard Android application installation screen appeared. This screen had two buttons at its bottom entitled "*Install*" and "*Cancel*". The screen stated

    "*Allow this application to:*"

    And then gave a number of possibilities, with headings and a description of what the application may be able to do. For example, the first possibility had a heading

    "*Your messages*"

    Followed by the description

    "*read SMS or MMS, receive SMS*"

Amongst these possibilities was the following description

> "*Services that cost you money*"

Followed by the description

> "*send SMS messages*"

18. Where a consumer pressed the Install button, a further page appeared stating "*Application installed*" and with two buttons entitled "*Open*" and "*Done*".

19. Where a consumer pressed the Open button, the same or a similar page and screen of the page to those described at paragraphs 19 to 22 of the ESoC-ML (the "Homescreen" and "Homepage") appeared. Again, the terms and conditions set out in paragraphs 21 and 22 of the ESoC-ML were present in the same location as described in those paragraphs (above the title of the Homescreen and right at the bottom of the Homepage). Again, that meant that a consumer would only see the terms and conditions if they were to scroll above the title that appeared on the Homescreen or right to the bottom of the entire Homepage.

20. Therefore, if a consumer were to approach the Homescreen and not (as is the usual course of things) scroll up beyond the title 'Pornhub' at the top of the Homescreen, and, click on a video before scrolling right to the bottom of the Homepage, they would never see any pricing information whatsoever.

21. When the Executive clicked on one of the links, the video did appear and three text messages were received at a total charge of £4.50.

22. The screenshots from the monitoring of the PIL webpage show the working of Service 3 at **Annex 2**.

<u>The Breaches</u>

Rule 2.2.5

23. Outcome 2.2 of the Code provides

> "*That consumers of premium rate services are fully and clearly informed of all information likely to influence the decision to purchase, including the cost, before any purchase is made.*"

Rule 2.2.5 of the Code provides

> "*In the course of any promotion of a premium rate service, written or spoken or in any medium, the cost must be included before any purchase is made and must be prominent, clearly legible, visible and proximate to the premium rate telephone number, shortcode or other means of access to the service.*"

24. With regard to Services 2 and 3, as stated in paragraph 30 of the ESoC-ML, if a consumer did not scroll up above the title of the Homescreen, or, to the bottom of the Homepage, they would get no pricing information whatsoever regarding the accessing of the videos that were linked on the Homepage.

25. As stated above, there would, in the normal course of things, be no reason for a consumer who is presented with a screen to scroll *up*. The natural presumption would be that the screen presented is the entirety of the page unless something on the screen rebutted that presumption. With regard to the bottom of the Homescreen, there was reason to scroll down as there were clearly more videos linked. However, there was no reason to scroll to the bottom of the Homepage as there were no more videos there, simply small print. Further the pricing information required by rule 2.2.5 was obscured in small print.

26. The words of the standard Android application installation screen cannot be relied upon by PIL as fulfilling the obligation to provide pricing information because: it did not contain any actual pricing information regarding the services, it was not prominent, and, it was not clear or proximate to the means of access to the service. Thus it did not satisfy the terms of Rule 2.2.5.

27. Therefore, the pricing information cannot, on any basis, be described as prominent, clear, legible, visible or proximate to the means of access to the service: the links to the videos.

28. The complaints at **Annex 1** evidence this alleged breach and support this analysis of the Services.

Rule 2.3.2

29. Outcome 2.3 of the Code provides

> "*That consumers of premium rate services are treated fairly and equitably.*"

30. Rule 2.3.2 of the Code provides

> "*Premium rate services must not mislead or be likely to mislead in any way.*"

31. However, the Executive raises this distinct allegation because the structure of the entirety of Services 2 and 3, not just the positioning of their pricing information, renders those Services utterly misleading.

32. With regard to Services 2 and 3, the placing of the Top Small Print above the title of the Homescreen required an action on the part of PIL (or a gross lack of monitoring, it does not appear to be in dispute that the placing of the Top Small Print was done deliberately, albeit the motive for doing so is in dispute), it did not happen by accident. As such it misled and that is in itself sufficient to breach Rule 2.3.2.

33. Therefore, these are promotional structures that mislead.

34. It is the Executive's submission that if this allegation is wrongly conflated with the allegation of breach of Rule 2.2.5 then justice will not have been done. If every breach of Rule 2.2.5 led to a breach of Rule 2.3.2, the Code would have done away with one of those rules. The two rules attack two different mischiefs. It is likely that where the mischief in Rule 2.3.2 is made out then an allegation that Rule 2.2.5 will also have

been made out but not *vice versa*. This is a classic case of pricing information being obscured by design and not mere omission. As such, a clear breach of Rule 2.3.2 is made out by the Services.

35. The complaints at **Annex 1** evidence this alleged breach and support this analysis of the Services.

Rule 2.3.3

36. Outcome 2.3 of the Code provides

> "*That consumers of premium rate services are treated fairly and equitably.*"

37. Rule 2.3.3 of the Code provides

> "*Consumers must not be charged for premium rate services without their consent. Level 2 providers must be able to provide evidence which establishes that consent.*"

38. With regard to Service 1; the Executive received a complaint regarding MSISDN 07[redacted] (the "Complainant's MSISDN"). From the message log supplied by PIL (at **Annex 8**), it could be seen that the Complainant's MSISDN had incurred charges on 9 September 2012 in relation to Service 2. On 11 September 2012, the complainant sent the following messages to shortcode 69011:

> "*Never watched any ????*"

> "*U wont get paid*"

Despite sending a message clearly disputing the incurring of charges (rightly or wrongly), on 18 September 2012 the Complainant's MSISDN was charged £9 in relation to shortcode 69011.

39. This charging was raised with PIL (at **Annex 7** and **8**) and its response was that "the consumer subscribed in error".

40. From this exchange it is demonstrable that the complainant had been charged without consent, and, PIL could not provide evidence to establish that consent.

41. With regard to Service 2; 24 complaints were received regarding this Service. From these complaints, the Executive put a number of MSISDNs of complainants to PIL. These MSISDNs were: 07, 07, 07, 07, and, 07. This was done on 19 February 2013 (**Annex 7**).

42. On 28 February 2013, PIL responded by stating that a third party verification service was used to establish consent. When the Executive contacted a third party verification service that was used by PIL, it confirmed that, at the time of the alleged breaches, all the verifier could do was to provide a "*once-per-day snapshot of their various brands*".

43. PhonepayPlus Guidance on 'Privacy and consent to charge' (the "Guidance", Appendix 18) provides factors that could demonstrate "robust" verification of consent. These include, for example, a record being taken of the opt-in, and data being time-stamped in an appropriately secure web format.

44. The Guidance is illustrative of how consent can be demonstrated and the nature of such demonstration. It is the Executive's case that consideration of the Guidance demonstrates that PIL could not demonstrate consent to anywhere near a satisfactory degree.

45. However, even without referring to the Guidance, it stands to reason that a once-per-day snapshot does not demonstrate consent to charge in any satisfactory way.

46. With regard to Service 3; the 27 complaints (at **Annex 1**) demonstrate, on a balance of probabilities, that consent to charge was not obtained. Not only does this offend the first limb of Rule 2.3.3, it also demonstrates that PIL was reckless as to whether consent to charge was being obtained. The structure of its service was such that PIL

did not ask of itself whether consent to charge by consumers was being obtained robustly or otherwise.

Rule 3.4.1

47. PIL is not registered with PhonepayPlus.

48. As a Level 2 provider that has provided premium rate services without registration, PIL has breached paragraph 3.4.1 in the most straightforward of terms.

49. This is far from a technical breach. Correspondence with the Executive from Mr Christian Amicabile on 28 February 2013 obfuscated which corporate entity was responsible for the Services (**Annex 6 and 8**). The Executive had to take steps to establish who the relevant Level 2 providers were for the Services. It then transpired that the same key personnel were responsible, from the same building, for the Services.

50. Registration of providers seeks to avoid precisely this type of confusion about who the provider of a particular service is.

Conclusion

51. The circumstances of these breaches, as set out above, make them very serious.

52. It is in the nature of premium rate services that their one-off and relatively small cost means that consumers that have been victims of breaches may not complain. Therefore, a number of complaints (and sometimes, in this case, corroboration by Executive monitoring) regarding a service is indicative that more have been victims. This is particularly so when it comes to pornographic services such as the ones at issue here.

53. It is the Executive's submission that this calls for the harshest penalties.

Bates Wells Braithwaite

22 July 2013